United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1674

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DOCKET NO. 74-1674

VIACOM INTERNATIONAL INC., *et al.*,
Plaintiffs-Appellees,

— *against* —

TANDEM PRODUCTIONS, INC.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Other Authorities:

United States Court of Appeals

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Issues Presented

1. Whether a party to a contract can rely upon an alleged antitrust violation to withhold agreed consideration for benefits received if the contract to be enforced is not intrinsically illegal and enforcement would not compel performance of any act made unlawful by the antitrust laws.

2. Whether it was clearly erroneous for the District Court to find that there were no material open points which precluded an effective oral agreement where the evidence established that such points were either resolved or never part of the negotiation, and were in any case immaterial.

3. Whether a Federal Communications Commission rule prohibiting certain acquisitions on or after July 23, 1971 was violated by an acquisition consummated in July 1970 pursuant to a binding oral agreement simply because such acquisition was later memorialized in a written contract executed after July 23, 1971.

4. Whether the assignment of a contract right to perform distribution services was valid where the contract expressly authorized assignment of rights and the assignment did not relieve the assignor of its obligations.

5. Whether the District Court erroneously excluded certain documents from evidence on grounds of attorney-client privilege.

Statement of the Case

Hon. Murray I. Gurfein, United States District Judge ("Judge Gurfein" or "District Court"), presided over the trial and all other proceedings below. His decision is reported at 368 F. Supp. 1264.

On July 5, 1973 Viacom International Inc. ("Viacom") and certain of its subsidiaries commenced this action against Tandem Productions, Inc. ("Tandem") to vindicate and protect against threatened irreparable injury Viacom's exclusive copyright license to distribute in syndication the famous television series "ALL IN THE FAMILY".

Viacom is the successor to the syndication and distribution business (collectively "distribution") of CBS Enterprises, Inc. ("CBS Enterprises"), a former subsidiary of Columbia Broadcasting System, Inc. ("CBS") (301a-305a, 361a-364a).[1] This business includes the domestic rerun distribution of television programs after their network run is completed, and the foreign distribution of such programs contemporary with network broadcast (765a). On June 4, 1971, in a spin-off transaction specifically approved by the Federal Communications Commission ("FCC"),[2] CBS Enterprises merged into Viacom, CBS assigned to Viacom whatever rights it possessed or acquired to distribute television programs in syndication, and Viacom's stock was distributed by CBS to its shareholders (363a-364a, 376a, 1020a-1083a).

Tandem is in the business of producing television programming, and is the packager of ALL IN THE FAMILY (117a ¶ 10, 120a ¶ 18, 129a ¶ 2, 130a ¶ 7).

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1. References to " a" are to pages of the "Appendix", which consists of three volumes designated "Appendix" and two volumes designated "Exhibits".

2. *In re Columbia Pictures Industries, Inc.*, 30 F.C.C.2d 9, *aff'd sub nom. Iacopi* v. *FCC*, 451 F.2d 1142 (9th Cir. 1971).

Viacom charged Tandem with violation of Viacom's exclusive right, as assignee under an agreement between Tandem and CBS, to distribute ALL IN THE FAMILY in syndication both in the United States and abroad (123a-127a). Viacom claimed that Tandem granted CBS the exclusive distribution rights, that CBS validly assigned such rights to Viacom, and that Tandem wrongfully sought to terminate and interfere with Viacom's assigned rights (118a-121a, 123a-127a). The primary relief sought was a declaration of Viacom's contract rights, and an injunction against Tandem's further breach of or interference with such rights (127a).

Tandem's answer alleged as a "Fifth Defense" that the agreement between Tandem and CBS on which plaintiffs' rights are founded was void as violative of the antitrust laws (132a-136a). Prior to trial plaintiffs moved under Fed. R. Civ. P. 12(c), 12(f), 12(h)(2) and 56 to strike this defense as insufficient (142a-171a). The District Court reserved decision (249a) and, at its suggestion (517a-518a), Tandem filed an offer of proof (675a-685a) to enable a determination whether, assuming the facts set forth in such offer, the antitrust defense was available (368 F. Supp. at 1267).

Judge Gurfein tried the case, without a jury, on September 17 through 20 and October 4, 1973, and on January 4, 1974 rendered his decision concluding that Viacom was entitled to injunctive relief. (368 F. Supp. at 1278)

Judge Gurfein found that (1) negotiations between Tandem and CBS resulted in a binding oral agreement in or about July 1970, whereby, *inter alia,* CBS was granted the exclusive right to distribute ALL IN THE FAMILY in syndication (368 F. Supp. at 1268-70); (2) the oral agreement of July 1970 was thereafter memorialized in a written contract dated as of July 10, 1970 (368 F. Supp. at 1268); (3) the written contract contained a provision permitting CBS to assign, and CBS did validly assign, the distribution

rights to Viacom (368 F. Supp. at 1275); and (4) Tandem wrongfully sought to terminate and interfere with Viacom's exclusive right (368 F. Supp. at 1274-75). He rejected Tandem's contention that CBS' acquisition of the distribution rights violated an FCC regulation prohibiting such acquisitions after July 23, 1971 since CBS had acquired the rights pursuant to the oral agreement of July 1970 (368 F. Supp. at 1272).

Further, Judge Gurfein dismissed Tandem's Fifth Defense, holding that Tandem was not entitled to raise purported antitrust violations as a defense to prevent enforcement of the contract (368 F. Supp. at 1278). He found that the contract was not inherently illegal and concluded that a judgment requiring Tandem's adherence to its grant of the distribution rights would not order any act violative of the antitrust laws (368 F. Supp. at 1278).

Final judgment was entered on April 17, 1974 declaring that Viacom has an exclusive copyright license to distribute or syndicate ALL IN THE FAMILY in the United States and abroad, and enjoining Tandem from breaching its obligations or interfering with Viacom's rights under such license (730a-732a).

Statement of Facts

The Oral Agreement Between CBS And Tandem in July 1970 And Performance Thereunder

CBS and Tandem commenced negotiations concerning ALL IN THE FAMILY in May 1970 (368 F. Supp. at 1268; 255a-258a) and, as a result, entered into a binding oral agreement in or about July 1970 (the "7/70 Oral Agreement") (368 F. Supp. at 1268). Among the fundamental deal points[3] CBS agreed to broadcast the program over the CBS television network for a period of up to five or

3. *See* 368 F. Supp. at 1268-69 for an enumeration of the points comprising the 7/70 Oral Agreement. The evidence supporting the District Court's conclusion that an oral agreement was reached at that time is discussed at pages 30-33, 5-6 *infra*.

five and a half years, depending on when broadcasts began, pay Tandem specified license fees for network broadcasts, absorb certain of Tandem's per episode production costs, and advance to Tandem certain pre-production moneys. On its part, Tandem agreed, among other things, that "CBS shall have all syndication and distribution rights * * *" at CBS' standard fees (368 F. Supp. at 1268-69).[4]

Immediately after reaching agreement the parties commenced performance of their respective obligations under the 7/70 Oral Agreement. This was entirely consistent with the custom and practice in the television industry for the networks and producers to perform on the basis of oral agreements and to leave the documentation for a later day (348a-349a, 841a-842a, 791a).

From July 16 through December 10, 1970 CBS paid Tandem $109,902.97 and $12,000 in recoupable (1016a, 870a, 955a) and nonrecoupable (870a, 954a, 956a; *see* 1113a) advances, respectively. And, after notifying Tandem in mid-November 1970 that it would commence broadcasts in the middle of the 1970-71 telecast season (872a), CBS made the necessary arrangements with its affiliates (1120a, 1115a). Commencing on January 12, 1971, CBS proceeded with network exhibition on a regular weekly basis, for which it paid Tandem the applicable license fees (295a, 346a, 1252a). At the same time CBS through its subsidiary, CBS Enterprises, proceeded with worldwide efforts to distribute the series in syndication (366a-377a).[5]

On Tandem's side, Mr. Lear began working on production matters in July-August 1970 (368 F. Supp. at 1270; 818a) and continued through the fall on a seven-days-a-

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4. The evidence supporting the District Court's finding that as part of the 7/70 Oral Agreement Tandem granted CBS the distribution rights to the show is as follows: 269a-270a, 273a, 348a, 432a-433a, 438a-440a, 503a-504a, 1119a, 938a ¶5; *cf.* 270a-272a, 275a-278a, 284a-285a, 516a, 542a-545a.

5. 874a-876a, 1086a-1100a, 879a-880a, 888a-893a, 1101a-1102a, 1005a-1007a (in chronological order).

week basis (827a-828a). During the summer and early fall of 1970 Tandem, among other things, worked on scripts, made deals with writers, retained the director, arranged for music and finalized casting (818a-824a, 827a). After moving into the CBS production facilities in the early fall of 1970, Tandem commenced shooting of the series and by the January 12, 1971 air date had already taped three shows. (368 F. Supp. at 1270; 293a, 825a, 821a-824a, 839a-840a). Simultaneously Tandem's representatives proceeded with efforts to "clear" foreign territories for distribution[6] (957a-960a, 874a, 897a, 884a-887a (in chronological order)).

Reduction Of The 7/70 Oral Agreement To Writing

On September 25, 1970 CBS circulated to Tandem a form of agreement with respect to ALL IN THE FAMILY (Ex. 12 (859a-866a)) ("Agreement Circulated 9/25/70").[7] While there had been no discussion of an assignment clause during the negotiations leading to the 7/70 Oral Agreement, CBS included its customary assignment clause as paragraph 20 in the Agreement Circulated 9/25/70 (368 F. Supp. at 1272; 289a-290a).

Tandem responded on October 6, 1970 and, while commenting on a number of items, raised no objection to the assignment clause (868a-869a). CBS replied on October 20th, resolving these items for the most part in Tandem's favor (870a-871a). CBS heard nothing more from Tandem concerning the Agreement Circulated 9/25/70 until

6. Because the program was based on a British show entitled "Til Death Us Do Part", before CBS could commence distribution in a particular foreign country Tandem had to arrange with the owner of the British show to obtain the consent of those to whom he had licensed the British show in that country (*see* 270a).

7. At that time the proposed name for the show was "Wally's Castle".

April 1971,[8] after the series had proved a success and had been picked up by CBS for another season, when Tandem's attorney, who had received copies of the agreement and related correspondence in September and October 1970, suddenly questioned a number of details (607a-612a, 355a-357a, 881a-883a).

Tandem also commenced unsuccessful efforts to get CBS to limit its right of assignment provided in paragraph 20 of the Agreement Circulated 9/25/70, so as to preclude CBS from carrying out its intended assignment of the distribution rights to Viacom (633a-634a, 883a, 463a-470a, 904a, 636a-637a, 645a-649a, 651a-652a). By July 22, 1971, however, the parties had resolved all of Tandem's questions and, as the District Court found, on that date CBS prepared the final version of the agreement reflecting such resolution (368 F. Supp. at 1273, Ex. 63 (907a-917a)).[9] The July 22, 1971 version, which contained an assignment clause identical to that appearing in the Agreement Circulated 9/25/70, was subsequently executed by both Tandem and CBS without change (Ex. 65A (920a-929a); 316a-317a).

Thus, after the parties had performed under the 7/70 Oral Agreement for approximately a year its terms were reduced to writing in the integrated written "Memorandum of Agreement dated as of July 10, 1970" (the "7/10/70 Agreement") (Ex. 65A (920a-929a)). Tandem's grant to CBS of the exclusive right to distribute ALL IN THE FAMILY is memorialized in paragraph 12 of the 7/10/70 Agreement. Paragraph 12 provides in pertinent part:

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8. In March 1971 there was a meeting between Tandem and CBS at which CBS agreed to *amend* the "previously existing agreement" to provide more financial aid to Tandem (296a-298a, 877a-878a).

9. The typing date placed in the lower left-hand corner of the final version of the agreement in accordance with the identification procedures of the CBS Business Affairs Department indicates it was prepared on July 22, 1971 (300a-301a). The unexecuted copy circulated to Tandem and the fully executed copy are, respectively, Exhibits 63 (907a-917a) and 65A (920a-929a).

> "* * * CBS shall have all syndication and distribution rights to the programs, to the extent that Contractor [Tandem] shall secure the same, at CBS' standard distribution fees (40% foreign, 40% domestic station-by-station, 25% domestic regional, 10% domestic network) and CBS shall pay Contractor all net profits derived therefrom after deduction of said distribution fees and all distribution expenses. * * *" (Ex. 65A, ¶ 12 (925a)).

CBS' distribution rights under ¶12 were fully assignable. Paragraph 20 of the 7/10/70 Agreement, which remained unchanged since it first appeared in the Agreement Circulated 9/25/70, provides:

> "CBS may assign its rights hereunder in full or in part to any person, firm or corporation provided, however, that no such assignment shall relieve CBS of its obligations hereunder." (927a)

And in connection with the Viacom spin-off, CBS assigned to Viacom the exclusive right to distribute ALL IN THE FAMILY in syndication (368 F. Supp. at 1275).

The FCC's Financial Interest Rule

On May 4, 1970 the FCC adopted a rule[10] (the "financial interest rule") to become effective September 1, 1970 under which a television network could not acquire, *after the effective date of the rule,* any financial or proprietary interest in the distribution of a television program not produced by

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10. As originally adopted, the rule provided in pertinent part:
"(j) Network syndication and program practices
"(1) * * * no television network shall:
* * * * *
"(ii) after September 1, 1970, acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network * * *." (*Report and Order,* 23 F.C.C.2d 382, 402 (1970)).

An amended version of the financial interest rule is at 47 C.F.R. § 73.658(j)(1)(ii) (1972).

the network (*Report and Order,* 23 F.C.C.2d 382, 402 (1970)). It is undisputed (T. Br. 8-9)[11] that, after the FCC had deferred for a month the date following which the rule was to become effective (35 Fed. Reg. 13650 (1970)), this Court by orders in the case of *Mount Mansfield Television, Inc.* v. *F.C.C.,* further postponed the rule's effective date until July 23, 1971, approximately one full year after CBS had acquired the right to distribute ALL IN THE FAMILY under the 7/70 Oral Agreement (368 F.Supp. at 1271-72; 1155a-1158a, 1153a-1154a, 1147a, 1150a-1151a, 600a-604a).

I. DISMISSAL OF THE ANTITRUST DEFENSE SHOULD BE AFFIRMED SINCE THE LICENSE AGREEMENT IS NOT INTRINSICALLY ILLEGAL AND TANDEM HAS RECEIVED THEREUNDER THE PRIZE FOR WHICH IT ENDEAVORS TO WITHHOLD CONSIDERATION.

Tandem contends that the District Court erred in striking the Fifth Defense and ruling inadmissible the evidence in support thereof which Tandem tendered by written offer of proof (T. Br. 10-13; 368 F. Supp. at 1278).

In substance, the Fifth Defense charged that the 7/10/70 Agreement is unenforceable because CBS abused its alleged power to control access to network television by conditioning its acceptance of a license for the network exhibition of ALL IN THE FAMILY on Tandem's granting of an additional license to distribute the show in syndication (132a-136a). The offer of proof recited an elaborate set of complex facts, all extrinsic to the 7/10/70 Agreement, which purported *inter alia* to establish CBS' market power and its use of such power to coerce Tandem during the license negotiations to accept the claimed tie-in (675a-684a; 368 F. Supp. at 1276).

The District Court's dismissal of the Fifth Defense was based on the well-established principle that a party to a

11. References to "T. Br. " are to pages of the "Brief for Defendant-Appellant".

contract cannot rely upon alleged antitrust violations to withhold agreed consideration for benefits received if the contract to be enforced is not inherently invalid (368 F. Supp. at 1277-78). Since, as here, a contract for the granting of a license can be proved the result of an illegal tie-in only, if at all, by resort to extrinsic background evidence, the District Court correctly ruled that the 7/10/70 Agreement was not inherently invalid. Further, the District Court correctly recognized that enforcement of the distribution license, unlike, for example, a price fixing or group boycott agreement, would not compel the performance of any act made unlawful by the antitrust laws (368 F. Supp. at 1278).

Accordingly, since Tandem had already received and intended to continue receiving the benefits of network exhibition for which it had exchanged *inter alia* the distribution rights, the Fifth Defense was legally insufficient to relieve Tandem of its part of the bargain.

A. The General Rule Is That The Defense Of Antitrust Illegality Is Insufficient To Defeat An Action On A Contract

In *Kelly* v. *Kosuga,* 358 U.S. 516, 518 (1959), the Supreme Court observed:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. * * *" (Footnote omitted.)

Thus, when confronted with antitrust defenses in contract actions, the federal courts have generally ruled that the contract must be enforced and that the defendant must seek redress for any alleged antitrust injury in a separate, treble damage action of his own. *E.g., Kelly* v. *Kosuga, supra; Bruce's Juices, Inc.* v. *American Can Co.,* 330 U.S. 743, 754-57 (1947); *Atlantic Richfield Co.* v. *Malco Petroleum, Inc.,* 471 F.2d 1258, 1260-61 (6th Cir. 1972) (tie-in not a defense to contract action); *Buffler* v. *Electronic Computer Pro-*

gramming Institute, Inc., 466 F.2d 694, 700 (6th Cir. 1972) (tie-in not a defense to contract action); *Columbia Nitrogen Corp.* v. *Royster Co.*, 451 F.2d 3, 14-15 (4th Cir. 1971); *Dickstein* v. *duPont*, 443 F.2d 783, 785-88 (1st Cir. 1971); *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437, 441 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); *Nassau Sports* v. *Peters*, 352 F. Supp. 870, 877-82 (E.D.N.Y. 1972); *N. Y. Automatic Canteen Corp.* v. *Automatic Canteen Co.*, 1963 Trade Cas. ¶ 70,625 (S.D.N.Y. 1962).[12]

The rule barring such defenses is grounded on three pragmatic policy considerations: (1) a party should not obtain the benefits of a contract without consideration; (2) the exclusive legislative antitrust remedies do not include avoidance of private contracts; and (3) antitrust defenses unreasonably prolong and complicate contract litigation. In the present case, these policy considerations mandated dismissal of Tandem's Fifth Defense.

1. A Party Should Not Obtain The Benefits Of A Contract Without Exchanging The Agreed Consideration

In *Kelly* v. *Kosuga*, 358 U.S. 516, 520-21 (1959), the Supreme Court indicated that the primary consideration underlying the rule barring antitrust defenses in contract actions was "the overriding general policy * * * 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" And the lower courts have found this a compelling reason to disallow such defenses. *E.g.*, *Dickstein* v. *duPont*, 443 F.2d 783, 786 (1st

12. *Accord*, *United States* v. *Fayco Elec. Co.*, 273 F. Supp. 367 (N.D.N.Y. 1962); *cf. Levin* v. *IBM*, 319 F. Supp. 51, 56 (S.D. N.Y. 1970). The rule discussed herein with regard to defenses predicated upon violations of the federal antitrust laws is equally applicable to defenses predicated upon violations of the New York antitrust statute, section 340 of the New York General Business Law. *E.g.*, *Fleet-Wing Corp.* v. *Pease Oil Co.*, 29 Misc. 2d 437, 440, 212 N.Y.S.2d 871, 876 (Sup. Ct. Erie Co. 1961); *Loew's Inc.* v. *Radio Hawaii, Inc.*, 20 Misc. 2d 587, 590, 191 N.Y.S.2d 676, 679-80 (Sup. Ct. N.Y. Co. 1959).

Cir. 1971); *Nassau Sports* v. *Peters*, 352 F. Supp. 870, 880-81 (E.D.N.Y. 1972); *N. Y. Automatic Canteen Corp.* v. *Automatic Canteen Co.*, 1963 Trade Cas. ¶70,625, at 77,564 (S.D.N.Y. 1962); *United States* v. *Fayco Elec. Co.*, 273 F. Supp. 367, 368 (N.D.N.Y. 1962).

In the *N. Y. Automatic Canteen Corp.* case, for example, Judge Palmieri refused to permit an antitrust defense to defeat enforcement of the defendant's contract obligation not to compete with the plaintiff in the New York area. Referring to *Kelly* v. *Kosuga*, Judge Palmieri stated:

> "* * * The [Supreme] Court gave explicit favorable recognition to the policy of 'preventing people from getting other people's property for nothing where they purport to be buying it.' Were this Court to give effect to the antitrust defense, it would be allowing defendant to repudiate its equitable obligations to plaintiff for its own financial benefit, and would thus be sanctioning the very result the Supreme Court has disavowed. * * *" (1963 Trade Cas. ¶70,625, at 77,564 (Footnote omitted))

There could not be a clearer case for application of this policy than presented here. It is undisputed that Tandem's agreement to give CBS the exclusive right to distribute ALL IN THE FAMILY in syndication was a basic part of the negotiations which led CBS to agree to broadcast the show and to pay Tandem substantial benefits (266a-269a, 247a, 278a, 422a-426a, 436a-437a, 440a, 938a).[13] CBS' Donald Sipes[14] explained that the amount CBS was willing to pay a producer for broadcast rights depended in part on whether CBS also was able to acquire the distribution

13. The District Court found that as part of the 7/70 Oral Agreement whereby CBS agreed to broadcast ALL IN THE FAMILY and pay substantial consideration to Tandem, Tandem granted the distribution rights to CBS (368 F. Supp. at 1268).

14. Donald Sipes ("Sipes") was during the relevant period vice president, business affairs, for the CBS Television Network (Trial Transcript p. 81, part of the record on appeal).

rights (tr. 233-34; *see* tr. 231-32).[15] And specifically in the case of ALL IN THE FAMILY, the amount CBS agreed to pay Tandem for the broadcast rights reflected the fact that CBS was receiving the distribution rights (268a-269a, 278a). Moreover, CBS agreed to pay Tandem an additional $16,000 for its best efforts to clear foreign areas for distribution (284a-285a, 925a ¶12). Tandem's Mr. Hayes[16] confirmed that since CBS wanted the distribution rights he had sought to improve the monies payable to Tandem elsewhere in the deal (503a-505a), and had succeeded in improving the price by $8,000 to $10,000 per episode through increased network license fees and various other means (422a-423a, 437a-438a).

As the District Court observed, Tandem's bargain has proved a very good thing (368 F. Supp. at 1277, 1278). Through June 30, 1973 CBS has paid Tandem a total of $5,731,090 for new and repeat programs (314a), $509,902.97 and $12,000 in recoupable and nonrecoupable production advances, respectively (312a, 314a), and $16,000 for clearing foreign distribution areas (314a, 906a; 148a ¶10; 913a ¶12). And through the same date, Viacom has paid Tandem $105,925.23 as the producer's share of receipts from foreign distribution (168a ¶2).

Obviously, it is frivolous for Tandem to argue on appeal that "[i]n our case there is no question of getting anything for nothing. * * *" (T. Br. 11). The whole purpose of its antitrust defense is to get the benefits of the 7/10/70 Agreement without having to honor its grant of the distribution rights which was part of the agreed consideration for such benefits. Moreover, it is anomalous for Tandem to argue that its grant of the distribution rights was not part of the

15. References to "tr. " are to pages of the trial transcript, which is part of the record on appeal, not included in the Appendix.

16. William Hayes ("Hayes") was during the relevant period Tandem's business manager, its Secretary-Treasurer and one of its directors (417a, 593a-594a, 790a).

consideration it agreed to exchange for the benefits of network exhibition when its goes so far as to assert that such grant was in fact the *condition* of receiving such benefits (680a ¶14, 681a ¶17, T. Br. 13).

Were Tandem's defense to be sustained it would be unjustly enriched through retention of a key element of the consideration promised for benefits it has already enjoyed and will continue to receive.[17] And worse, this unjust enrichment would not be at the expense of CBS, the alleged wrongdoer, but at the expense of Viacom, the innocent purchaser of the distribution rights for value.

2. The Exclusive Legislative Antitrust Remedies Do Not Include Avoidance Of Private Contracts

The remedies provided by Congress for antitrust violations are exclusive, and do not include the avoidance of contracts. In *Kelly* v. *Kosuga*, for example, the Supreme Court reaffirmed the principle that "the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction." (358 U.S. at 519).

This rule is soundly based upon principles of statutory construction, *see, e.g., D. R. Wilder Mfg. Co.* v. *Corn Prods. Refining Co.*, 236 U.S. 165, 174-75 (1915), as well as upon the fear that such a sanction would operate capriciously. *See, e.g., Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 753-54 (1947). Thus, the severity of such a sanction is wholly unrelated to any anticompetitive injury,[18] and depends solely on the amount of the consideration remaining unpaid. *Id.* Moreover, there is a strong probability that

17. Except for the grant of the distribution rights, Tandem has not sought to invalidate any portion of the 7/10/70 Agreement, which still has approximately two years to run.

18. It is relevant that recovery is authorized under §4 of the Clayton Act not for all losses which may result from a transaction violative of the antitrust laws but only for damages caused by its anticompetitive effects. *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752, 756-59 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973).

such a sanction would be Draconian in operation. In *Bruce's Juices,* for example, the defendant sought to avoid paying the purchase price for goods on the ground that it had been charged a discriminatorily higher price in violation of the Robinson-Patman Act. The Supreme Court refused to allow the defense on the ground, among others, that the damage inflicted by such a sanction might well be out of all proportion to the anti-competitive harm to be redressed. It stated:

> "But, of course, if the discount system of the Can Company makes all of the Bruce purchases illegal and the price thereof recoverable, all sales to others under the discount system must be similarly tainted. It is hard to see how any of the Can Company's sales are valid if these to Bruce are void on the theory advanced. If this view is taken, certainly the remedy would soon end illegal quantity business discounts—by ending the business. We do not believe Congress has contemplated so deadly a remedy or has left the way open to us by judicial edict to dislocate business as such a holding would do. * * *" (330 U.S. at 754)

The same considerations apply with equal force to the present case.[19]

3. Antitrust Defenses Unreasonably Prolong and Complicate Contract Litigation

The courts have recognized that permitting antitrust defenses in contract suits would unreasonably prolong and complicate contract litigation and substantially disrupt the normal conduct of commercial business. The First Circuit summarized this concern in *Dickstein* v. *duPont,* 443 F. 2d 783 (1st Cir. 1971), as follows:

> "* * *[T]he ready availability of such [antitrust] defenses would tend to prolong and complicate contract disputes. In this case [seeking collection of a commission], for example, an attempt to prove that

19. See the discussion at p. 16, *infra.*

> the Stock Exchange rule resulted in an unreasonable restraint of trade would involve a massive and lengthy process of discovery plus a lengthy and complex trial. To convert a fairly simple contract dispute into such an unwieldy process seems wasteful. Moreover, the possibility of utilizing the threat of expensive litigation of complex antitrust issues as a contract defense would be used as a weapon by disgruntled contracting parties, were they able easily to litigate such issues." (443 F. 2d at 786)

The predictable result of the free availability of antitrust defenses would be that companies engaged in antitrust litigation with the government or private parties would find those antitrust issues injected by way of defense into every suit brought to collect the purchase price of goods sold. In Viacom's case, it might well find issues concerning CBS' compliance with the antitrust laws injected into its day-to-day contract problems.

Thus, a very substantial part of Viacom's inventory of programs available for immediate or future distribution consists of properties assigned to Viacom in connection with the spin-off (18a ¶40). The allowance of Tandem's purported antitrust defense would set an extremely dangerous precedent which could be employed against Viacom by any other producer who wished to back out of his commitment or exert pressure for an improvement in terms. Whether or not Viacom might eventually vindicate its rights in all such disputes, having the enforceability of the contracts which underpin its day-to-day dealings turn upon the outcome of antitrust litigation concerning CBS' conduct would severely disrupt its ability to conduct business.

Clearly, there are strong policy reasons for requiring that antitrust claims be adjudicated in separate, affirmative actions and allowing day-to-day contract actions to proceed unhampered by antitrust issues.

B. The Present Case Is Not Within The Exception To The General Rule Since The 7/10/70 Agreement Is Not Intrinsically Illegal

As recognized by the District Court (368 F. Supp. at 1277-78), the Supreme Court has provided a narrowly circumscribed exception to the general rule against antitrust defenses in contract actions. This exception is available only where the contract sued upon is "intrinsically illegal" or "inherently invalid", *e.g., Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 755 (1947), *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248, 252 (1925), so that "* * * the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act * * *." *Kelly* v. *Kosuga*, 358 U. S. 516, 520 (1959); *Dickstein* v. *duPont*, 443 F.2d 783, 786 (1st Cir. 1971). Here the exception is clearly inapplicable since, whatever Tandem may or may not be able to prove outside the contract, on its face the grant of a license constitutes a valid intelligible economic transaction in itself which may be enforced without ordering any illegal act.

Tandem's Fifth Defense charges that CBS used its alleged control over access to network television to compel Tandem to grant CBS the right to distribute ALL IN THE FAMILY in syndication. Although Tandem thus alleges an illegal tie-in (T. Br. 10), it is clear that the alleged illegality cannot be found within the four corners of the 7/10/70 Agreement. To establish the violation Tandem must show *inter alia* (1) that CBS possessed market power[20] and (2) that it actually employed that power to coerce Tandem.[21] On its face the 7/10/70 Agreement is a valid contract disposing of broadcast and distribution rights for consideration. Nothing in the contract provides

20. *E.g., Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 6, 11 (1958).

21. *E.g., American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 446 F. 2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

any basis whatsoever for a finding of market power or coercive employment of such power. The Court would have to go off the face of the contract in order to make any such findings. Therefore, as the District Court properly concluded (368 F. Supp. at 1278), the 7/10/70 Agreement is not intrinsically illegal and remains fully enforceable regardless of any extrinsic facts which allegedly demonstrate that it is part of an overall illegal arrangement.

In *Bruce's Juices,* the Supreme Court ruled that a contract would not be held intrinsically illegal unless the plaintiff could not prove his contract claim without proving his violation of the antitrust laws. There, the defendant sought to avoid paying the purchase price for cans on the ground that the seller had given discriminatorily lower prices to defendant's competitors. It argued that a judgment for plaintiff would enforce the illegal price discrimination. Assuming the illegality of the overall situation, the Supreme Court held that the contract in suit was not intrinsically illegal:

> "* * * It is plain that the violation, if there was one, is not inherent in the contract sued upon, whether it be the notes or the sale of the goods, but can only be found in different transactions which a party to the litigation had with third persons who are not parties. No such defense has been approved under the Sherman Act * * *.
>
> "* * * If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid plaintiff to recover. Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law. It is only when the Court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to discrimination—a fact unnecessary to sustain plaintiff's cause of action—that the basis of the defense asserted here appears.

> The Court does not give its approval to transactions between one of the litigants and a third party just because it holds them irrelevant in this litigation." (330 U.S. at 755-56. (Footnote omitted.))

In the present case Viacom has proved its contract claim without proving any violation of the antitrust laws. Enforcement of the 7/10/70 Agreement cannot, therefore, be defeated by the assumption *arguendo* that beyond the confines of this contract Tandem can prove that CBS had leverage resulting from the structure of the network television broadcast market and that it actually employed such leverage to coerce Tandem into relinquishing its syndication rights.

Where, as here, the contract sought to be enforced is an intelligible economic transaction in itself enforcement will not be denied because of the presence of a larger anticompetitive arrangement. In *Kelly* v. *Kosuga*, for example, the plaintiff sought to recover the purchase price of 50 carloads of onions purchased from plaintiff by defendant. Defendant contended that he and others had been coerced into purchasing onions from plaintiff by threats that plaintiff would dump large quantities of onions into the market depressing the price. Defendant also contended that his purchase had been made as part of a conspiracy among plaintiff, defendant and other growers and distributors of onions to withhold available supplies of onions from the market and thereby fix the price of onions. The Supreme Court assumed the illegality of the arrangement to withhold the onions from market but determined that the defense of antitrust illegality was not available to defeat a suit on the contract for purchase of the onions:

> "* * * [W]hile the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. * * * [W]here, as here, a

> lawful sale for a fair consideration constitutes *an intelligible economic transaction in itself,* we do not think it inappropriate or violative of the intent of the parties to give it effect even through it furnished the occasion for a restrictive agreement of the sort here in question. * * *" (358 U.S. at 521. (Emphasis added.))

In *Columbia Nitrogen Corp.* v. *Royster Co.,* 451 F.2d 3, 14-15 (4th Cir. 1971), Royster brought an action to enforce a written contract by which Columbia Nitrogen had agreed to purchase phosphate, and Columbia Nitrogen sought to raise as a defense that the contract was part of an illegal reciprocal dealing arrangement. The evidence proffered by Columbia Nitrogen supported its claim that the contract had been conditioned on purchases by Royster from Columbia Nitrogen (451 F.2d at 14 n. 18). The Court of Appeals nonetheless held that the sale to Columbia Nitrogen could be enforced, even though evidence off the face of the contract showed that it was one part of an illegal reciprocal dealing arrangement, since the sale was " 'an intelligible economic transaction in itself' " (451 F.2d at 15). Precisely the same situation exists here. The grant of the distribution license is a separate intelligible transaction in itself, which Tandem cannot avoid by proof off the face of the contract that it is one part of an illegal trying arrangement.[22]

In *Nassau Sports* v. *Peters,* 352 F. Supp. 870, 878-82 (E.D.N.Y.), a National Hockey League team sought to pre-

22. In *Columbia Nitrogen Corp.* the court also observed:

> "By the time Royster brought this action, the parties had terminated their reciprocal dealing, and the award of damages to Royster cannot exclude competitors." (451 F.2d at 15)

A substantially similar situation obtains here. The substance of the alleged violation is CBS' misuse of power in the network television market to obtain unwarranted power in the syndication market. However, by reason of the spin-off of Viacom, CBS is no longer a participant in the syndication market. Hence, enforcement of the 7/10/70 Agreement could not adversely affect competition in that market.

vent Peters from breaching his contract and playing for a team franchised by the newly established World Hockey Association. The plaintiff's right to Peters' services was predicated upon the reserve clause in his player contract. Peters alleged that the National Hockey League monopolized the business of major league professional hockey and that the reserve clause in player contracts written by National Hockey League teams was the primary method of maintaining that league's illegal monopoly. Nevertheless, the court refused to sustain the antitrust defense. Judge Neaher ruled that "defendants have come forward with no convincing evidence which places this breach of contract case within 'the narrow scope in which the defense [of illegality] is allowed in respect of the Sherman Act.'" *Id.* at 880. Amplifying this ruling, the court stated:

> "* * * Defendant Peters voluntarily accepted employment under the allegedly illegal contract when his playing talents had no other outlet. He raises the antitrust question only when it appears to be no longer in his economic interest to comply with his agreement. That was not heretofore regarded as a sufficient excuse for breach of contract and should not become so when the claimed illegality, if any, is clearly divisible from the personal services commitment made. Kelly *v.* Kosuga * * *." (*Id.* at 881)

Clearly, the 7/10/70 Agreement is not intrinsically illegal but rather an intelligible economic transaction, valid on its face and well within the scope of these precedents. A contract granting a license, regardless of background, is not inherently illegal (*see* 368 F. Supp. at 1278).

Nor does the judgment herein (729a-733a) compel the performance of any act in itself illegal, much less enforce "* * * the precise conduct made unlawful by the [Sherman] Act * * *." *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959). Thus, for example, it does not enforce an explicit agreement to fix prices, to allocate territories, to engage in a group boycott, or to monopolize (368 F. Supp. at 1278). It literally

does nothing more than enjoin Tandem's further breach of or interference with Viacom's license to distribute ALL IN THE FAMILY.

Perhaps it is because the judgment here so obviously does not offend the *Sherman Act* that Tandem argues that "* * * the 'precise conduct made unlawful' by the *FCC rule* is enforced and aided by the judgment. * * *" (T. Br. 11; emphasis added.) But the FCC's financial interest rule is of no greater assistance to Tandem's argument than the Sherman Act. Not only is this administrative rule irrelevant to the antitrust defense, but as discussed at pages 23-38, 8-9, it had not become effective at the time of, and is inapplicable to, Tandem's grant of the distribution license.

To support its contention that the antitrust defense is proper even though the alleged antitrust illegality does not appear on the face of the contract, Tandem places principal reliance upon language from *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909). But whatever inconsistency may have existed between *Continental Wall Paper Co.* and the statement of the rule against use of antitrust defenses in *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248, 252 (1925), *D. R. Wilder Mfg. Co.* v. *Corn Prods. Co.*, 236 U.S. 165, 172, 177 (1915) and *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), has been definitively resolved by the Supreme Court in the modern cases of *Kelly* v. *Kosuga* and *Bruce's Juices*. *See, United States* v. *Fayco Elec. Co.*, 273 F. Supp. 367 (N.D.N.Y. 1962). As demonstrated above, these cases limit the use of such defenses to situations where the illegality is intrinsic in the contract to be enforced.

Equally misplaced is Tandem's reliance on *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922) (contract provision mandating exclusive dealing), *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942) (contract provision fixing prices), *Bement* v. *National Harrow*

Co., 186 U.S. 70 (1902) (contract provision fixing prices) and *Farbenfabriken Bayer A. G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *aff'g*, 197 F. Supp. 613 (D.N.J. 1961), *cert. denied*, 372 U.S. 929 (1963) (contract for horizontal division of markets). Each of these cases involved a situation where the alleged antitrust illegality appeared on the face of the contract. *Kentucky Rural Elec. Coop. Corp.* v. *Moloney Elec. Co.*, 282 F.2d 481 (6th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961), was not even a contract action but rather a treble damage suit under the Robinson-Patman Act where judgment for plaintiff would have had the effect of requiring defendant to perform an illegal act. And *Bromberg* v. *Moul*, 275 F.2d 574 (2d Cir. 1960) did not even involve an antitrust defense but rather a defense based on an alleged violation of a price control regulation of the Office of Price Stabilization.

II. THE DETERMINATION THAT CBS' ACQUISITION OF THE DISTRIBUTION LICENSE DID NOT VIOLATE THE FCC'S FINANCIAL INTEREST RULE SHOULD BE AFFIRMED SINCE CBS ACQUIRED THE LICENSE PRIOR TO THE EFFECTIVE DATE OF THE RULE.

Tandem contends that the District Court erred in determining that CBS' acquisition of the distribution license did not violate the financial interest rule since it occurred pursuant to the 7/70 Oral Agreement, approximately a year before the rule became effective on July 23, 1971 (368 F.Supp. at 1271-72).

In support of this contention of error, Tandem offers three principal arguments. In Point IV of its brief it claims that five allegedly open, unresolved points prevented the 7/70 Oral Agreement from ever becoming binding on the parties (T.Br.20-22). In Point II it claims that even if the 7/70 Oral Agreement were effective, the fact that such agreement was later memorialized in the written 7/10/70 Agreement requires, pursuant to principles of novation and

the parol evidence rule, that it be disregarded and that the grant of the distribution license be deemed to have occurred at the time the 7/10/70 Agreement was executed subsequent to July 23, 1971 (T.Br. 15-17). Finally, it argues in Point II that the District Court should not have found the FCC rule inapplicable simply because the parties antedated the 7/10/70 Agreement (T.Br. 13-15).

Tandem's arguments, however, are without substance since

(1) the District Court correctly found that the allegedly open points relating to Canada, control of programming, and CBS' standard distribution fees were resolved and not left open, that the points relating to the "black family" and assignability were not part of the negotiation of the 7/70 Oral Agreement but came up later as adjustments or amendments to the previously existing agreement, and that in any event none of the points was sufficiently material to prevent the 7/70 Oral Agreement from becoming effective (368 F.Supp. at 1269-70),[23]

(2) neither the principle of novation nor the parol evidence rule required the District Court to disregard the fact that Tandem granted CBS the distribution license pursuant to the 7/70 Oral Agreement a year before the financial interest rule became effective, and

(3) the District Court did not find the financial interest rule inapplicable because the 7/10/70 Agreement was antedated to reflect the date of actual agreement but rather because Tandem granted CBS the distribution license in or about July 1970 pursuant to the 7/70 Oral Agreement (368 F. Supp. at 1271-72).

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23. Judge Gurfein found and listed the 15 "essential points" of the 7/70 Oral Agreement (368 F.Supp. at 1268-69).

A. The District Court Correctly Found That Allegedly Open Points Did Not Prevent The 7/70 Oral Agreement From Becoming Effective

Although Tandem claims (T.Br. 2, 6, 21) that five allegedly open points prevented CBS and Tandem from reaching a binding agreement in July 1970, it has wholly failed to sustain the heavy burden of establishing that the District Court's contrary findings (368 F. Supp. at 1269-70) were clearly erroneous. *See, e.g., Watson* v. *Joshua Hendy Corp.*, 245 F.2d 463, 464 (2d Cir. 1957); *Hedger* v. *Reynolds*, 216 F.2d 202, 203 (2d Cir. 1954); *International Bureau, Inc.* v. *Bethlehem Steel Co.*, 192 F. 2d 304, 306 (2d Cir. 1951). Thus, it has not made the requisite "* * * clear demonstration that such findings are without adequate evidentiary support in the record * * *." *Chalk* v. *Beto*, 429 F.2d 225, 227 (5th Cir. 1970). Nor, in light of the record, would any such demonstration be possible.

1. The Evidence Specifically Pertaining To The Five Points Supports the District Court's Findings

a. *Control Over Program Content*

The District Court found that

> "* * * The control of programming by CBS was not left open; the parties apparently came to a sensible agreement about it, providing that the program would ridicule the far 'left' as well as the far 'right'. * * *" (368 F. Supp. at 1269)

Because of the controversial nature of the show CBS, from the outset, was concerned that it be handled responsibly (1014a). Prior to May 5, 1970 William Tankersley, the network's vice president for Program Practices, and network president Robert Wood met with Mr. Lear, the prospective producer, stager and headwriter of the series (*cf.*, 272a-273a; 939a ¶¶ 9, 12; 118a), and Mr. Yorkin, the co-owner with Mr. Lear of Tandem. CBS's purpose was to determine whether it could rely upon Mr. Lear to be

reasonable and responsible in his handling of the program's content. (794a-796a, 800a-802a, 1014a, 1085a, 1116a). The meeting apparently satisfied everyone (797a-798a), and thereafter CBS and Tandem commenced negotiations which led to the 7/70 Oral Agreement (368 F. Supp. at 1268; 1116a, 257a-258a).

On June 26, 1970, Mr. Lear met with Richard Jencks, president of CBS Broadcast Group and Mr. Wood's superior, to discuss program content (851a). Mr. Jencks wanted to determine whether it would be possible to present a balanced view of opposing social and political philosophies. Messrs. Lear and Jencks were in agreement that the program should not be politically one-sided but would ridicule the "left" as well as the "right" (851a, 807a, 810a-812a).

Two weeks later Mr. Wood met with Mr. Lear and reported to Mr. Jencks that he had again stressed the need for evenhandedness and had been "able to get some language in the contract that points that up" (1015a). Mr. Wood also reported that he was satisfied that Mr. Lear understood the situation, would meet his responsibilities, and did not view CBS' attitude as "unreasonable nor too restrictive in terms of executing the basic premise of the show" (1015a). Mr. Yorkin's testimony confirms that Mr. Lear and Mr. Wood were in accord that Mr. Lear and Mr. Tankersley would be able to work together (837a).

As agreed by Mr. Lear in July (1015a), language assuring balanced program content was included in the Agreement Circulated 9/25/70 (Ex. 12) as paragraph 19 (863a-864a) and met with no objection until Mr. Perlberger addressed the matter in April 1971 (883a). As the result of Mr. Perlberger's efforts, CBS agreed to add to paragraph 19 a further subparagraph acknowledging that the episodes already delivered were satisfactory (1279a, 903a, 914a-915a ¶19), and prior to July 22, 1971 the matter of

language was resolved on this basis (see p. 7 *supra;* 1084a, Ex. 138X[24] (966a-967a)).[25]

The fact that the 7/10/70 Agreement (Ex. 65A (920a-929a)), with the addition of the CBS acknowledgement, repeats paragraph 19 exactly as it appeared in the Agreement Circulated 9/25/70 (Ex. 12 (859a-866a)) confirms the undisputed evidence that the point was agreed upon during the summer of 1970.

The only reason proffered by Tandem as to why control over program content remained an open matter is its assertion that although program content was discussed, the matter of who would control the content was not (T.Br. 21 n. 14). It is evident, however, that the question of control was mutually resolved by the parties when, in June-July 1970, they agreed upon a standard by which the show's content was to be judged. Each side thus relinquished unilateral control over program content in favor of control by reference to an agreed-upon standard. And neither CBS nor Mr. Lear foresaw any particular problem as to the ability of Mr. Lear and Mr. Tankersley to work together in the area of program content.

b. *Inclusion of Canada In Network Broadcast Area*

The District Court found that

> "Whether CBS was to get Canadian network broadcast rights without payment of additional license fees was discussed, but apparently resolved in favor of Tandem. In any event, the Canadian

24. Although Exhibit 138, as well as Exhibits 56, 79, 84, 85, 87, 128 and 133 were excluded from evidence (368 F.Supp. at 1278 n.45), it is proper for the Court to consider these exhibits for the reasons set forth in Point IV *infra.* Whenever reference is made to one of these exhibits the exhibit number will be set forth followed by an "X".

25. Tandem's suggestion that paragraph 8 deals with program content (T.Br. 22 n. 15) is belied by the uncontroverted evidence establishing that paragraph 19 governed program content (631a-633a, 638a-639a, 883a, 1279a, 903a), while paragraph 8 dealt with CBS approval of the cast and other creative personnel (616a-617a, 882a).

> network broadcasting was a relatively minor appendage to the whole deal. * * *" (368 F. Supp. at 1269)

The District Court apparently accepted the testimony of Tandem's own witness, Mr. Perlberger, that the broadcast license fee negotiated in June-July 1970 was on the basis of the United States only and not on the basis of Canada and, hence, that Canadian rights required additional license fees (622a-623a, 882a). Furthermore, while Mr. Hayes, another Tandem witness, testified that the Canada question was left open at the June 24, 1970 meeting (440a-441a), he also testified that all such open points, including the fundamental matters relating to money, were resolved by July or, at the latest, August 1970 (450a, 557a-558a, 564a). Accordingly, the record adequately supports the District Court's finding that the Canada question was resolved.

Moreover, as the District Court also found, the Canada question was too immaterial to prevent a binding agreement whether or not resolved (368 F. Supp. at 1269). Such immateriality is conclusively demonstrated by the evidence as to the actual dollar value to Tandem of its Canadian profit sharing arrangement (Ex. 65A ¶11 (912a)). In 1972 CBS' east coast office made payment of the monies due Tandem on account of "Canadian Network Profit Sharing 1971-72 Season" totalling $27,827 (313a). Altogether CBS paid Tandem a total of $2,110,079 in 1971 (315a) and $2,609,629 in 1972 (313a-314a). Allocating half of each such total, or $2,359,854, to the 1971-72 season, it appears that CBS' payment on account of Canada amounted to about 1% of its total payments for the period. In light of its immateriality the Canadian question, even if not resolved, could not have prevented a binding agreement. *E.g., Franklin Research & Dev. Corp.* v. *Swift Elec. Supply Co.*, 340 F.2d 439, 443 (2d Cir. 1964); *United States* v. *City of New York*, 131 F.2d 909, 914-915 (2d Cir. 1942), *cert. denied*, 318 U.S.

781 (1943); *Purvis* v. *United States*, 344 F.2d 867, 869-70 (9th Cir. 1965).[26]

c. *CBS' Standard Distribution Fees*

The District Court found that "* * * CBS' 'standard fees' for distribution were well-known and required no spelling out by percentage figures, * * *" (368 F. Supp. at 1269).

At trial it was established without contradiction that CBS and Tandem agreed in June-July 1970 that CBS would have the distribution rights at its "standard fees", and that CBS' standard fees were definite and ascertainable (269a-270a, 273a, 348a, 365a-366a, 516a). Indeed, the CBS standard fees the witnesses described as prevailing at the time of the 7/70 Oral Agreement correspond identically with the percentages subsequently included in the 7/10/70 Agreement (Ex. 65A ¶12 (925a)).

Since price terms fixed by reference to ascertainable standards are uniformly enforced, it is clear that CBS and Tandem were not prevented from reaching a binding oral agreement by their provision as to CBS' standard fees. *See, e.g. Matter of States Marine Lines, Inc.*, 13 N.Y. 2d 206, 213, 245 N.Y.S.2d 581, 586-87 (1963); *Stern* v. *Premier Shirt Corp.*, 260 N.Y. 201, 204, 183 N.E. 363, 364 (1932); *V'Soske* v. *Barwick*, 404 F.2d 495, 500 (2d Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); 1 Williston, *Contracts* §41, at 133 (3d ed. 1957); 1 Corbin, *Contracts* §98, at 433-34 (1963). Accordingly, the District Court's finding was correct.

d. *Cost Of The Black Family*

The District Court found

> "* * * With regard to payment by CBS for the black family, Mr. J. William Hayes of Tandem acknowledged that its ultimate solution represented an

26. *Accord, Mid-Continent Tel. Corp.* v. *Home Tel. Co.*, 319 F. Supp. 1176, 1189 (N.D. Miss. 1970); *Comerata* v. *Chaumont, Inc.*, 52 N.J. Super. 299, 145 A.2d 471, 475 (App. Div. 1958); 1 Corbin, *Contracts* §29, at 94-95 (1963); 1 Williston, *Contracts* §48 (3d ed. 1957).

adjustment (in March 1971) '. . . to the previously existing agreement . . .'" (368 F.Supp. at 1270)

Obviously this matter was not "open" in the summer of 1970 since it admittedly (T.Br. 6) was not even part of the negotiations of the 7/70 Oral Agreement. The subject first arose in March 1971 when Tandem representatives met with Mr. Sipes to request relief from the tight budget imposed by the agreed package price (457a-458a, 296a-297a, 844a-845a). Mr. Sipes agreed, among other things, to reimburse the actual out-of-pocket costs incurred by Tandem for the black family (459a, 298a). In his March 26, 1971 letter confirming the arrangement, Mr. Hayes expressly acknowledged that such reimbursement represented an adjustment "* * * to the previously existing agreement * * *". (877a).

In view of the late date of this adjustment it could have had no effect on the binding character of the 7/70 Oral Agreement. And, in any case, Tandem has made no showing that the adjustment was material or why, even if material, it should affect the binding character of the agreement which it amended.

e. *CBS' Right Of Assignment*

Similarly, the matter of CBS' right of assignment was clearly not "open" in the summer of 1970 since, as the District Court found (368 F.Supp. at 1270), and Tandem concedes (T.Br. 6), it too was not discussed in connection with the 7/70 Oral Agreement (289a-290a, 450a). The District Court correctly ruled (368 F.Supp. at 1270) that this lack of an assignment provision did not deprive the 7/70 Oral Agreement of binding effect.

2. The Statements Of, And Performance By, The Parties Establish That The 7/70 Oral Agreement Was Binding

a. *The Parties' Statements*

On June 24, 1970 a meeting was held at CBS to wrap up the matters discussed in the preliminary negotiations (260a, 266a). Mr. Sipes, the CBS negotiator, testified no fewer

than four times that as far as he was concerned at the conclusion of the meeting CBS and Tandem had an agreement (260a, 287a, 307a, 343a) and he thereafter reported to Mr. Wood that he had closed the deal (344a).

Following the June 24th meeting, or the next evening, Mr. Sipes and Irwin Siegelstein, a CBS vice president, met with Mr. Hayes and Mr. Cohn, Tandem's negotiators, and Norman Lear in the Ground Floor Cafe, a restaurant in the CBS building. Mr. Sipes recalls that they all had a drink and talked about the arrangement regarding ALL IN THE FAMILY (283a-284a). And Mr. Lear confirms that they congratulated each other on making a deal (808a-809a).

On June 25, 1970 Mr. Cohn addressed a memorandum to Mr. Lear summarizing the "CBS proposal regarding THOSE WERE THE DAYS" (938a-939a).[27] On July 20, 1970, Mr. Perlberger sent Mr. Cohn a letter in which he stated:

> "* * * I understand from Norman Lear and Bill Hayes that you have concluded the negotiations with CBS, and we anxiously look forward to receive a memorandum outlining the matter in which you have concluded various points under discussion * * *." (Ex. 84X(946a-947a))

On July 24, 1970 Mr. Cohn replied as follows:

> "I would like to confirm that the deal with CBS was closed on the basis of my memo to Norman Lear of June 25, 1970 a copy of which is enclosed for your information, with the following two changes * * *." (Ex. 87X(951a))[28]

Mr. Hayes testified that with respect to the business aspects of the transaction the parties reached agreement in July or, at the latest, August 1970 (450a, 557a-558a,

27. "Those Were The Days" was an early title for ALL IN THE FAMILY (254a).

28. Mr Sipes confirmed that he had agreed to the two changes described by Mr. Cohn (284a-285a).

564a).[29] He also testified that within 30 days of the June 24, 1970 meeting, all open points were resolved, Tandem approved the terms of the deal, and such approval was reported to Mr. Sipes (557a-558a).

Prior to July 7, 1970 Mr. Lear sent Beryl Vertue, the agent for the owner of the British show on which ALL IN THE FAMILY is based, a cable telling her that the deal with CBS was almost finalized (940a-941a, 813a-814a). Thereafter on July 10 and July 20, 1970 Mr. Lear addressed letters to Mr. Hayes and Mr. Perlberger, respectively, in which he referred to the CBS deal in terms indicating that agreement had been reached (944a; Ex. 85X(948a)).

Nowhere, however, is the existence of an agreement more clearly evidenced than in Mr. Hayes' letter to Mr. Sipes of March 26, 1971 (877a-878a). In this letter Mr. Hayes confirmed a renegotiation of certain price terms (*See* 844a-847a), the results of which were incorporated in an amendment dated July 21, 1971 (930a) to the 7/10/70 Agreement. Mr. Hayes stated:

> "I want to personally thank you and Gerry for helping us ease the burden on Tandem Productions with reference to the increment increases and other attending problems with reference to the *previously existing agreement* on the above referenced project [All In The Family]." (Emphasis added.)

Mr. Hayes continued:

> "* * * For purposes of clear communication, my notes reflect the following adjustments in the *existing agreement*: * * *." (Emphasis added.) (877a)

b. *Performance by the Parties*

It is undisputed that it is the custom and practice in the television industry for the networks and producers to perform on the basis of oral agreements and to leave the docu-

29. Mr. Hayes also testified that since Mr. Lear was to meet with CBS concerning program content this was not resolved on June 24th. As shown at pages 25-27 *supra*, however, this matter was resolved by Mr. Lear with Messrs. Jencks and Wood.

mentation for a later day (348a-349a, 841a-842a, 791a). Here, the performance by the parties after mid-July 1970 of their respective obligations under the 7/70 Oral Agreement (*see* pp. 5-6 *supra*) leaves no doubt that by such time they had reached a binding agreement as to ALL IN THE FAMILY. And evidence of such performance is highly probative of the existence of a binding agreement. *See, e.g., Eggers* v. *Armour & Co.*, 129 F.2d 729, 732 (8th Cir. 1942); *Newburgh* v. *Florsheim Shoe Co.*, 210 F. Supp. 599, 602 (D. Mass. 1961); 1 Williston, *Contracts* § 28A, at 74-75 (3d ed. 1957).[30]

Thus, there can be no doubt that as far as the parties were concerned a binding agreement had been reached.[31]

B. The District Court Was Not Required By Principles Of Novation Or The Parol Evidence Rule To Disregard CBS' Acquisition Of The Distribution License Pursuant To The 7/70 Oral Agreement

Viacom proved the existence of the 7/70 Oral Agreement solely to establish that the distribution license memorialized in paragraph 12 of the 7/10/70 Agreement (925a) was actually acquired by CBS before the FCC's financial interest rule became effective on July 23, 1971. Tandem, however, while conceding *arguendo* that CBS acquired the license pursuant to the 7/70 Oral Agreement (T.Br. 15),

30. *Accord, Helen Whiting, Inc.* v. *Trojan Textile Corp.*, 307 N.Y. 360, 366, 121 N.E. 2d 367, 369-70 (1954); *Braten Apparel Corp.* v. *Rutger Fabrics Corp.*, 35 App. Div. 2d 921, 318 N.Y.S. 2d 771 (1st Dept. 1970); *Gerber* v. *Equitable Life Assurance Soc.*, 1 Ill. App. 2d 272, 117 N.E. 2d 393, 397 (Dist. Ct. App. 1954); 1 Corbin, *Contracts* § 30 at 107-109 (1963 ed.).

31. Although the District Court did not find it necessary to reach the matter because it agreed that the 7/70 Oral Agreement was binding, it should be noted that Viacom proved that a binding oral agreement was in any event reached on or before July 22, 1971, when the final agreement was prepared (*See* Plaintiffs' Post-Trial Memorandum pp. 64-66, which is part of the record on appeal). And the District Court did find that on July 22, 1971 "CBS prepared a final version of the agreement, reflecting the parties' resolution of all questions." (368 F. Supp. at 1273).

contends that principles of novation and the parol evidence rule required the District Court to disregard the actual July 1970 acquisition date and to find instead that it occurred at the time the 7/10/70 Agreement was executed subsequent to July 23, 1971 (T.Br. 15-17).

In brief, Tandem's position is that if the parties had never reduced the 7/70 Oral Agreement to writing CBS' acquisition of the license could not have violated the financial interest rule. However, the mere act of memorializing the oral agreement *ipso facto* rendered unlawful what was otherwise lawful. Unsurprisingly, there is no legal basis for such a conclusion.

The District Court correctly found (368 F. Supp. at 1270) that the 7/70 Oral Agreement was binding when reached, even though a subsequent written agreement was contemplated, since there was no showing that the parties did not intend to be bound until execution of the formal document. *E.g., V'Soske* v. *Barwick*, 404 F.2d 495, 499 (2d Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Smith* v. *Onyx Oil & Chemical Co.*, 218 F.2d 104, 108 (3d Cir. 1955).[32] If contemplation of a subsequent written agreement did not prevent CBS from effectively acquiring the distribution license in July 1970, the fact that the contemplated writing was later executed obviously could not, and did not, change the acquisition date.

The irrelevance of the doctrine of novation is manifest from the one case cited by Tandem. In *Alexander* v. *Angel*, 37 Cal. 2d 856, 236 P.2d 561 (Sup. Ct. 1951), plaintiffs sought to foreclose a chattel mortgage given by defendant as security for his notes. Defendant admitted making the agreement sued upon, but claimed that under a later agreement third parties had assumed his obligation and this

32. *Accord, Tymon* v. *Linoki*, 16 N.Y. 2d 293, 299, 266 N.Y.S. 2d 357, 361 (1965); *Brause* v. *Goldman*, 10 App. Div. 2d 328, 331-33, 199 N.Y.S. 2d 606, 610-12 (1st Dept. 1960), *aff'd*, 9 N.Y. 2d 620, 210 N.Y.S. 2d 225 (1961); 1 Williston, *Contracts* §28, at 69 (3d ed. 1957).

constituted a novation precluding plaintiffs from enforcing their rights under the earlier agreement (37 Cal.2d at 858, 236 P.2d at 562). The court found for defendant, holding that because the later agreement constituted a novation plaintiffs could not enforce the terms of the earlier agreement. In the present case Viacom, unlike the plaintiffs in *Alexander,* is not seeking to enforce the terms of an earlier agreement despite a later agreement. Viacom is seeking to enforce the distribution license set forth in the 7/10/70 Agreement and proved the earlier 7/70 Oral Agreement solely to establish when CBS had acquired the license.

The *Alexander* case makes clear, moreover, that when the effect of a later agreement is described as the "discharge" of an earlier agreement, all that is meant is that suit cannot be brought to enforce the earlier agreement. *Accord*, *Triangle Waist Co.* v. *Todd*, 223 N.Y. 27, 30, 119 N.E. 85, 85-86 (1918) (Cardozo, J.); *Katz* v. *Bernstein*, 236 App. Div. 456, 458, 260 N.Y.S. 13, 16 (1st Dept. 1932); *Gary* v. *Gary*, 6 Misc. 2d 669, 670, 160 N.Y.S.2d 877, 878 (Sup. Ct. Nassau Co.), *aff'd*, 4 App. Div. 2d 948, 167 N.Y.S.2d 807 (2d Dept. 1957); *Taggart* v. *Graby*, 159 Misc. 155, 161, 286 N.Y.S. 382, 390 (Del. Co. Ct. 1936); 42 N.Y. Jur. *Novation* § 17 (1965). It does not mean that when the second agreement is reached, the fact that the first agreement existed can no longer be proved for any purpose.[33] Thus, in *Alexander* the court, in fact, relied on the earlier agreement in reaching its conclusion that there had been a novation (37 Cal. 2d at 861, 236 P.2d at 564). And where a contract annulling a prior agreement is thereafter rescinded by one of the parties, resort may thereupon be had to the rights under the original contract. *E.g., Thompson* v. *Thompson*,

33. Indeed, before there can even be a novation by virtue of a second agreement the court must find that there was a prior valid agreement. *E.g., Kinsella* v. *Merchants Nat'l Bank & Trust Co. of Syracuse*, 34 App. Div. 2d 730, 311 N.Y.S.2d 759 (4th Dept. 1970); *Taggart* v. *Graby*, 159 Misc. 155, 161, 286 N.Y.S. 382, 390 (Del. Co. Ct. 1936); 42 N.Y. Jur. *Novation* §7 (1965).

232 App. Div. 488, 494, 250 N.Y.S. 433, 439 (1st Dept. 1931) (*dicta*); *Travelers Ins. Co.* v. *Carey*, 24 Mich. App. 207, 214-17, 180 N.W.2d 68, 71-73 (Ct. App. 1970); *Spellman* v. *Ruhde*, 28 Wis.2d 599, 604, 137 N.W.2d 425, 428 (Sup. Ct. 1965); 6 Corbin, *Contracts* § 1293, at 152-53 (1951 ed.).[34]

Nor did the parol evidence rule bar consideration of the 7/70 Oral Agreement any more than the principle of novation did. This rule prevents the terms of an integrated written agreement from being varied by proof of an earlier oral agreement. *E.g., Laskey* v. *Rubel Corp.*, 303 N.Y. 69, 71, 100 N.E.2d 140, 141 (1951); *Aratari* v. *Chrysler Corp.*, 35 App. Div. 2d 1077, 316 N.Y.S.2d 680, 681 (4th Dept. 1970); *Restatement of Contracts* § 237 (1932). Proof of the 7/70 Oral Agreement, however, was not introduced to vary the terms of the 7/10/70 Agreement, but merely to establish that CBS had acquired the license set forth in paragraph 12 back in July 1970.

Furthermore, the parol evidence rule does not preclude extrinsic evidence establishing the actual date of an agreement. *E.g., Kincaid* v. *Archibald*, 73 N.Y. 189, 193 (1878); *Draper* v. *Snow*, 20 N.Y. 331, 333 (1859); *Bergman* v. *George*, 202 Misc. 998, 1002-03, 117 N.Y.S.2d 27, 29-30 (Sup. Ct. Brx. Co. 1952). But even if the parol evidence rule could conceivably have barred consideration of the 7/70 Oral Agreement, Tandem waived any rights it might otherwise have had by failing to object to such proof at trial and by not moving to strike the evidence after the trial. *E.g., Higgs* v. *De Maziroff*, 263 N.Y. 473, 478, 189 N.E. 555, 557 (1934); *Mitchill* v. *Lath*, 247 N.Y. 377, 379, 160 N.E. 646, 646-47 (1928); *Brady* v. *Nally*, 151 N.Y. 258, 264, 45 N.E. 547, 549 (1896).

Accordingly, Tandem's argument that principles of novation and the parol evidence rule compelled a finding that

34. *Accord*, 17A C.J.S. *Contracts* § 440, at 552 (1963 ed.); *cf. Kane Realty Co.* v. *National Children's Stores, Inc.*, 169 Misc. 699, 702, 8 N.Y.S.2d 505, 508 (N.Y.C. Mun. Ct. 1938).

CBS' acquisition of the distribution license occurred after the effective date of the financial interest rule has no merit.

Moreover, Tandem raises this argument for the first time on appeal, even though it could have been raised below. It is well established, however, that where a party has an opportunity but fails to raise a point before the trial court, it should not be permitted to raise that point for the first time on appeal as a basis for reversal of the trial court's decision. *E.g., Fortunato* v. *Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir.), *cert. denied,* 409 U.S. 1038 (1972); *Schwartz* v. *S. S. Nassau,* 345 F.2d 465, 466 (2d Cir.), *cert. denied,* 382 U.S. 919 (1965).[35]

C. The District Court Did Not Rely On The Effective Date Of The 7/10/70 Agreement In Concluding There Was No Violation Of The FCC's Rule

Tandem argues that since the District Court concluded that the 7/10/70 Agreement was effective by its terms "as of July 10, 1970", even though executed after July 23, 1971, it improperly permitted the parties to avoid the financial interest rule simply by antedating their written agreement (T. Br. 13-15). It is, however, entirely clear that the District Court did not find the rule inapplicable because the 7/10/70 Agreement was dated and thus rendered effective "as of July 10, 1970".[36] It found the rule inapplicable because CBS, pursuant to the 7/70 Oral Agreement, had in

35. *Accord, Simpson* v. *Standard Oil Co. (N.J.),* 223 F.2d 306, 308 (2d Cir. 1955); *Patent & Licensing Corp.* v. *Olsen,* 188 F.2d 522, 525 (2d Cir. 1951).

36. Tandem has distorted the context in which Judge Gurfein properly determined that the 7/10/70 Agreement was retroactively effective "as of July 10, 1970". Judge Gurfein concluded that although assignability had not been discussed in July 1970, CBS had such a right at all times after July 10, 1970 because the 7/10/70 Agreement, which provided that right, was effective by its terms as of that date (368 F. Supp. at 1270). He did not intimate, however, that the effective date of the 7/10/70 Agreement had anything to do with the inapplicability of the financial interest rule to CBS's acquisition.

fact acquired the distribution rights approximately one year before the rule took effect (368 F. Supp. at 1271, 1272).

III. THE DETERMINATION THAT CBS VALIDLY ASSIGNED THE DISTRIBUTION LICENSE SHOULD BE AFFIRMED.

Paragraph 12 of the 7/10/70 Agreement (Ex. 65A (925a)) grants CBS an exclusive license[37] to distribute ALL IN THE FAMILY in syndication. And paragraph 20 of the 7/10/70 Agreement provides:

> "CBS may assign its rights hereunder in full or in part to any person, firm or corporation provided, however, that no such assignment shall relieve CBS of its obligations hereunder." (927a).

Tandem advances two reasons why CBS' assignment of the license to Viacom allegedly exceeded the power of assignment conferred by paragraph 20. First, the license encompasses both rights and duties and paragraph 20 does not explicitly authorize the assignment of duties (T. Br. 17-18). And second, paragraph 20 expressly prohibits any assignment relieving CBS of its obligations (T. Br. 19).

Tandem's contention is without merit for several reasons. Paragraph 20 clearly and unambiguously authorized CBS to assign its right to perform the distribution service. Since the right to perform and the duty to perform are in reality one and the same, the power to assign the right necessarily included power to assign the duty. And Tandem fully understood when it signed the 7/10/70 Agreement that paragraph 20 authorized assignment of the distribution license to Viacom. Furthermore, the assignment of the license to Viacom did not relieve CBS of any of its obligations under the agreement.

Accordingly, the District Court correctly ruled that interpretation of the assignment clause was a matter for

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37. It is undisputed that the grant of the exclusive right to distribute the series constitutes an exclusive copyright license (730a ¶¶1(h), 2; *see* 368 F. Supp. at 1268, 1274, 1278).

judicial construction, that the clause permitted the assignment of distribution rights which could not be effective without concurrent assignment of distribution duties, that the parol evidence rule barred Tandem's contention that it had reserved a right to interpret the clause in a manner different from that required as a matter of law, but that in any event the evidence showed not only that Tandem did not in fact reserve any such right but that it had signed the 7/10/70 Agreement with full knowledge of the correct interpretation, having been so advised by CBS (368 F. Supp. at 1272-75).

A. The Assignment Clause Clearly Authorized CBS To Assign The License

Tandem argues that because paragraph 20 does not explicitly authorize assignment of the duty of performance and because duties of performance are involved in the distribution of the series, paragraph 20 should not be construed to permit assignment of the license (T. Br. 18-19). Since, however, Tandem clearly and unambiguously granted to CBS both the contract right to perform[38] distribution services and the power to assign its rights "in full or in part", and since the indivisible essence of the right to distribute is performance, the power to assign the right to perform necessarily included power to assign the duty to perform. Indeed, CBS could not possibly assign its right to

38. It is well recognized that a copyright license is by its very nature a *grant of the right to use a copyrighted work* in a particular way or for a limited time or in a limited geographic area. *E.g., First Financial Marketing Services Group, Inc.* v. *Field Promotions, Inc.*, 286 F. Supp. 295, 298 (S.D.N.Y. 1968); *Misbourne Pictures Ltd.* v. *Johnson*, 90 F. Supp. 978, 981 (S.D.N.Y. 1950), *aff'd*, 189 F. 2d 774 (2d Cir. 1951); Ball, *Law of Copyright and Literary Property* §236, at 530-31, §238, at 534-35 (1944). In *Misbourne Pictures*, for example, the grant of the right to distribute a motion picture was held to constitute a license. And in *Rohmer* v. *Commissioner*, 153 F.2d 61, 63 (2d Cir. 1946), the grant of serial rights in a literary property was held to be a license. Tandem's contention that the only right CBS received under the license was the right to collect fees (T. Br. 19) is therefore clearly erroneous.

perform the service, which Tandem concedes it was authorized to do (T. Br. 20), without automatically conveying the duty to perform the service, which was an inextricable part of the right.

Moreover, the parties themselves clearly and unambiguously referred to the distribution license as a "right". In paragraph 12 of the 7/10/70 Agreement (Ex. 65A (925a)), the parties explicitly recognized that the license to perform distribution services constituted a contract "right".[39] Similarly, in the side letter between CBS and Tandem dated August 26, 1971 (1277a-1278a), which was originally drafted by Tandem, and in Tandem's cover letter (918a) submitting to CBS a draft of the side letter, the license to distribute was expressly characterized as a "right". There can be no doubt that, as the parties freely acknowledged, CBS' authority and duty to distribute ALL IN THE FAMILY in syndication was a contract "right".

Nor is it surprising that the parties viewed the license to distribute as a "right", since the authority to distribute the show was considered an economic benefit, not some sort of burden. And in light of the parties' repeated references to the license as a "right", it is irrelevant that Tandem now questions whether use of the word "rights" was an apt way to refer to the license (T. Br. 20).

The only case directly on point appears to be *Waverly Prods., Inc.* v. *RKO Gen., Inc.*, 217 Cal. App. 2d 721, 32 Cal. Rptr. 73 (Cal. Dist. Ct. App. 1963). There, Waverly granted RKO an exclusive license to distribute two motion pictures. RKO's license encompassed several duties, includ-

39. Since the parties in paragraph 12 used the term "right" to encompass both the authority and duty to distribute, such term should have the same meaning in paragraph 20. As the New York Court of Appeals states:

> "* * * words and phrases as used in particular contracts are to be interpreted in accordance with the meaning with which they have been invested by the parties.* * *" (*Madawick Contracting Co.* v. *Travelers Ins. Co.*, 307 N.Y. 111, 119, 120 N.E.2d 520, 523 (1954)).

ing the duties to use its best efforts (217 Cal. App. 2d at 725, 32 Cal. Rptr. at 74) and to account for the revenues collected from distribution (217 Cal. App. 2d at 731, 734, 32 Cal. Rptr. at 78, 80). When RKO arranged for others to distribute the films overseas, Waverly claimed a breach of the license, asserting that RKO itself had to distribute and that its conduct constituted an improper assignment (217 Cal. App. 2d at 731, 32 Cal. Rptr. at 78). Waverly relied upon Article 9 of the license which, the court agreed, prohibited the transfer of burdens[40] unless expressly permitted by the license (217 Cal. App. 2d at 731, 32 Cal. Rptr. at 78). RKO contended that its action was authorized by article 4A which provided that RKO "* * * may assign or sub-license the distribution *rights* * * *" (217 Cal. App. 2d at 731, 32 Cal. Rptr. at 78) (emphasis added).

The court rejected Waverly's position, holding that article 4A permitted RKO to transfer both benefits and burdens:

> "* * * Plainly this [article 4A] contemplates transfer of benefits *or burdens*. It is the burdens with which appellant [Waverly] is concerned. But such a transfer of burden does not relieve the assignor of the obligation unless the other contracting party consents thereto * * *." (217 Cal. App. 2d at 731, 32 Cal. Rptr. at 78) (emphasis added)).

In response to Waverly's argument that the parties had intended that RKO itself carry out the distribution, the court made the following observation:

> "It is true that the agreement contains numerous provisions imposed upon RKO as distributor which require its personal performance, but those provisions presuppose that RKO will continue to do the distributing and *they are all subject to the sub-*

40. Article 9 provided in part that "Except as herein specifically provided, neither party hereto may assign this agreement in whole or in part, without the consent of the other * * *." (217 Cal. App. 2d at 731, 32 Cal. Rptr. at 78).

> *licensing provision of article 4A;* when that privilege is exercised and a sub-licensee takes over * * * he necessarily becomes the active performer of the distributor's obligations *pro tanto,* but RKO as the primary distributor remains obligated to the producer to see that all those obligations are properly performed * * *." (217 Cal. App. 2d at 728, 32 Cal. Rptr. at 76) (emphasis added)).

The *Waverly Prods., Inc.* case thus demonstrates that a clause like paragraph 20 which expressly authorizes the assignment of rights, even though it does not explicitly state that duties are also assignable, will sanction the transfer of both the rights *and the duties* comprising the license to distribute.[41]

Here, the case for such a result is even stronger. The uncontradicted evidence clearly establishes that when Tandem executed the 7/10/70 Agreement it knew that CBS intended to assign the distribution license to Viacom and recognized that paragraph 20 of the 7/10/70 Agreement permitted the assignment.

B. Tandem Understood When It Executed The 7/10/70 Agreement That Paragraph 20 Permitted CBS To Assign The License To Viacom

Each previous version of the written agreement between CBS and Tandem contained an assignment provision (¶20 of Exs. 12 (864a) and 710[42]) identical to paragraph 20 of the 7/10/70 Agreement (Ex. 65A (927a)). And it is undis-

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41. It should be noted that although the District Court had no occasion to reach the issue, Viacom has always contended that the license would have been assignable even without the assignment clause since the evidence established that Tandem was not entitled to insist on personal performance by CBS. This point is fully briefed at Plaintiffs' Memorandum In Answer To Defendant's Post-Trial Memorandum pp. 30-36 and Plaintiffs' Post-Trial Memorandum pp. 71-74, whch are part of the record on appeal.

42. An incomplete version of Exhibit 710 was reproduced in the Appendix at 1279a. This version does not include the revised form of agreement which is properly part of Exhibit 710. The complete version of Exhibit 710 is part of the record on appeal.

puted that Tandem sought, without success, to change paragraph 20 in order to preclude CBS from assigning the distribution rights to Viacom.

In April 1971 Mr. Perlberger, Tandem's attorney, sought to limit CBS' right of assignment as provided in paragraph 20 of the Agreement Circulated 9/25/70 (633a-634a, 883a).[43] Mrs. Nelson of CBS advised Mr. Perlberger that paragraph 20 was CBS' standard assignment clause which she had no authority to change (634a).

In May 1971, Tandem's Mr. Hayes supported Mr. Perlberger's efforts in telephone conversations with CBS' Mr. Sipes and his associate, Mr. Rubin (463a-470a). When Mr. Sipes confirmed Mr. Hayes' understanding that CBS intended to spin off its distribution rights to Viacom, Mr. Hayes argued that while he knew CBS always has its standard assignment clause, either the clause should be changed to preclude assignment to Viacom or CBS should agree to offer its rights to ALL IN THE FAMILY on the open market (463a-466a). In his conversation with Mr. Rubin, Mr. Hayes stated his understanding that under the FCC rule CBS would be out of the distribution business, questioned Viacom's prospective capability, and pronounced his support for Mr. Perlberger's position (467a-470a).

On June 16, 1971, CBS circulated a revised agreement to Tandem in which paragraph 20 remained unchanged (Ex. 710).[44] Shortly thereafter, Mr. Perlberger again sought to have Mrs. Nelson change the clause to limit CBS' right of assignment (636a-637a, 645a-649a, 651a-652a, 904a).

Mr. Perlberger argued that CBS had gone out of the distribution business and that the "* * * assignment clause should not permit CBS to assign the distribution rights in syndication to anyone, including Viacom, without Tandem's

43. On June 9, 1971, Mr. Cohn, one of Tandem's negotiators, admitted that Tandem had granted CBS the right to designate the distributor of ALL IN THE FAMILY (895a).

44. See the version of Exhibit 710 which is part of the record on appeal.

approval.* * *" (646a). He objected to CBS having "* * * the unrestricted right to transfer and assign its distribution obligations and syndication to the show.* * *" (647a) and insisted that Tandem should "* * * have the right, on whatever conditions it deems appropriate, to withhold or grant its approval to a transfer of these rights * * *." (648a). To achieve this result, Mr. Perlberger specifically asked that the language of paragraph 20 permitting CBS to assign its rights "in part" be deleted (904a, Ex. 56X, p. 3, ¶13 (902a)).

Mrs. Nelson took the unequivocal position that paragraph 20 was CBS' standard assignment clause (645a), that CBS had the right to assign to Viacom (651a), and that the clause could not be changed to limit CBS' right of assignment (647a).

On July 28, 1971, under paragraph 12 of their agreement, CBS paid Tandem $16,000 towards Tandem's expenses in clearing additional foreign territories for syndication (906a). Since by reason of the spin-off CBS had already departed the distribution business, it is clear that CBS would not have paid nor would Tandem have accepted such amount unless the parties were in agreement that CBS was entitled to pass on the benefit thereof to Viacom.

Notwithstanding its objections to CBS' assignment clause, Tandem thus gave up the fight for revision, and entered into the 7/10/70 Agreement knowing full well that paragraph 20 thereof would permit the assignment to Viacom (368 F. Supp. at 1273, 1275).

C. The Assignment To Viacom Did Not Relieve CBS Of Any Of Its Obligations

Tandem contends that CBS could not assign its exclusive license to Viacom because paragraph 20 of the 7/10/70 Agreement prohibits an assignment which "* * * shall relieve CBS of its obligations hereunder." (T. Br. 19-20). Such contention, however, lacks merit since the assignment to Viacom does not relieve CBS of any of its obligations.

While it permits Viacom to perform the distribution duties in place of CBS, the network remains obligated to see that those duties are properly performed. *United New York Sandy Hook Pilots Ass'n* v. *Rodermond Industries, Inc.*, 394 F.2d 65, 74 (3d Cir. 1968); *Edward Petry & Co.* v. *Greater Huntington Radio Corp.*, 245 F. Supp. 963, 967-68 (S.D.W. Va. 1965); *Rochester Lantern Co.* v. *Stiles & Parker Press Co.*, 135 N.Y. 209, 216-17, 31 N.E. 1018, 1021 (1892); *Waverly Prods., Inc.* v. *RKO Gen., Inc.*, 217 Cal. App. 2d 721, 728, 731, 32 Cal. Rptr. 73, 76, 78 (Cal. Dist. Ct. App. 1963); 3 Williston, *Contracts* § 411, at 20, 20 n. 18 (3d ed. 1960).[45]

In *United New York Sandy Hook Pilots Ass'n* v. *Rodermond Industries, Inc., supra,* for example, the Court of Appeals pointed out that while a party to a contract could properly delegate performance of *duties,* such action did not relieve the party of its contractual *obligations:*

> "* * * Since there was no requirement that it had to personally perform the electrical repairs, Rodermond could delegate this duty to K. & S., but Rodermond could not thereby relieve itself of its obligation * * *." (394 F.2d at 74)

And in *Waverly Prods., Inc.* v. *RKO Gen., Inc., supra,* where it was held that a provision authorizing a movie distributor to "assign or sub-license the distribution rights" permitted delegation of distribution duties, the court ruled that such delegation did not relieve the assignor of the obligation to see that all such duties are properly performed (217 Cal. App. 2d at 731, 32 Cal. Rptr. at 78; rulings quoted at pp. 41-42 *supra*).

Summarizing this principle Professor Williston states:

> "One who is subject to a duty though he cannot escape his obligation may delegate performance of it * * *.

45. *Accord, Gulf States Creosoting Co.* v. *Loving,* 120 F.2d 195, 199 (4th Cir. 1941); *Restatement of Contracts* §160(4) (1932); 4 Corbin, *Contracts* §866 (1950); Simpson, *Law of Contracts* §131, at 276 (2d ed. 1965).

> "The performance in such case is indeed in legal contemplation rendered by the original obligor, who is still the party liable if the performance is in any respect incorrect. * * *" (3 Williston, *Contracts* §411, at 20 (3d ed. 1960))

To avoid the impact of this clear legal principle, Tandem suggests, without any evidentiary support,[46] that the clause must have been intended to do more than afford Tandem its common law protection (T. Br. 19-20). On its face, however, the clause is no more than an unambiguous restatement of the common law principle. The word "obligations" in conjunction with "relieve" is clearly used in its common law sense to express the idea that CBS would remain responsible for performance by its assignee. Certainly it is not uncommon for careful lawyers to spell out in a contract rights which might otherwise exist at common law.

IV. THE COURT SHOULD TREAT CERTAIN DOCUMENTS ERRONEOUSLY EXCLUDED FROM EVIDENCE AS PART OF THE RECORD ON APPEAL

Upon Tandem's motion (691a), the District Court excluded eight letters[47] from evidence on grounds of attorney-client privilege ("privilege") (368 F. Supp. at 1278 n.45). For the reasons set forth below, these documents are not privileged. The Court, therefore, should rule that these documents were admissible and treat them as part of the record on appeal. *Jaffke* v. *Dunham,* 352 U.S. 280 (1957); *see Dandridge* v. *Williams,* 397 U.S. 471, 475 n.6 (1970).

A. Applicable Legal Principles

Set forth below are, first, the applicable legal principles and, second, a discussion of the reasons why in light of these principles, each of the eight letters is not privileged.

1. The privilege is waived where the holder has an opportunity in a legal proceeding to object to disclosure

46. Even if Tandem could conjure up extrinsic evidence to support its theory, it is doubtful that the parol evidence rule would permit the use of such evidence to vary this unambiguous clause.

47. Exhibits 56, 79, 84, 85, 87, 128, 133, 138.

of a privileged communication, but fails to do so. *United States* v. *Gurtner*, 474 F.2d 297, 299 (9th Cir. 1973); *Clyne* v. *Brock*, 82 Cal. App. 2d 958, 965, 188 P. 2d 263, 267 (Dist. Ct. App. 1947); McCormack, *Evidence* §93, at 194 (2d ed. 1972).[48]

2. Information communicated by a client to an attorney is not privileged if the client contemplates that the information is to be conveyed to a third party. *United States* v. *McDonald*, 313 F.2d 832, 835 (2d Cir. 1963); *United States* v. *Tellier*, 255 F.2d 441, 447 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958); McCormack, *Evidence* §91, at 188 (2d ed. 1972).

3. A party's production of a privileged document results in waiver of the privilege even if such production is inadvertent. *Underwater Storage, Inc.* v. *United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970); *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954).[49]

4. A communication from an attorney to a client which neither contains legal advice nor relates to facts communicated by the client to the attorney for purposes of obtaining legal advice or services is not privileged. *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358, 359 (D. Mass. 1950); *cf. Dura Corp.* v. *Milwaukee Hydraulic Prods., Inc.*, 37 F.R.D. 470, 471-72 (E.D. Wis. 1965).

5. A communication from a client to an attorney requesting business as opposed to legal advice is not privileged. *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950); McCormack, *Evidence* §88, at 179-80 (2d ed. 1972); Richardson, *Evidence* §434, at 422-23 (8th ed. 1955).

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48. *Accord, People* v. *Poulin*, 27 Cal. App. 3d 54, 64, 103 Cal. Rptr. 623, 630 (Dist. Ct. App. 1972); *Cote* v. *Knickerbocker Ice Co.*, 160 Misc. 658, 660, 290 N.Y.S. 483, 485 (N.Y. Mun. Ct. 1936); 58 Am. Jur. *Witnesses* § 523, at 293 (1948); *see Schwartz* v. *Travelers Ins. Co.*, 17 F.R.D. 330 (S.D.N.Y. 1954).

49. *cf. In re Horowitz*, 482 F.2d 72, 81-82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

6. A communication from an attorney to a client containing information relating to the client's affairs learned by the attorney from a third party is not privileged. *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950); *see King* v. *Ashley*, 179 N.Y. 281, 284, 72 N.E. 106, 107 (1904); 8 Wigmore, *Evidence* §2317, at 619 (McNaughton rev. 1961); Richardson, *Evidence* §431, at 421-22 (8th ed. 1955).

B. The Documents Were Not Privileged

Exhibits 79, 84 and 87 (943a-942a, 946a-947a, 951a-952a)

These letters were produced by Mr. Cohn at his deposition pursuant to a subpoena *duces tecum* (695a ¶3, 697a ¶13, 698a ¶21; 28a-30a). Tandem received a notice of the deposition which had annexed to it an exhibit describing the requested documents (695a ¶4; 19a-21a). At the deposition, in the presence of Tandem's attorneys who raised no objection, the letters were produced, examined and marked for identification on the record (695a-696a ¶¶5-8, 697a ¶13, 698a ¶21; 737a-741a). Nor did Tandem's attorneys take any steps to prevent Mr. Cohn from turning over copies of the documents to plaintiffs later in the week (696a ¶8, 697a ¶13, 698a ¶21). Moreover, Tandem permitted deposition testimony by Mr. Cohn as to the contents of Exhibits 84 and 87 (696a ¶9, 697a ¶14; 742a-743a) and by Mr. Perlberger as to Exhibit 79 (699a ¶22; 751a-752a).

Exhibits 79, 84 and 87 are therefore not privileged because Tandem's failure to object, first, to their inspection and production and, second, to testimony as to their contents, constituted a waiver.

Exhibit 138 (966a-967a)

This letter was produced without objection by Tandem under the same circumstances as Exhibits 79, 84 and 87 (698a ¶18). It does not contain legal advice or opinions, nor does it relate to facts furnished by Tandem to Mr. Perlberger for the purpose of securing legal advice. It

merely purports to transmit to Mr. Lear for his review and possible execution the July 22, 1971 version of the 7/10/70 Agreement, together with a CBS cover letter.

Accordingly, Exhibit 138 is not privileged because (1) it neither contains legal advice nor relates to facts communicated by Tandem to its attorney for purposes of securing legal advice or services, and (2) Tandem's failure to object to its inspection and production constituted a waiver.

Exhibit 85(948a)

This letter was produced without objection by Tandem under the same circumstances as Exhibits 79, 84 and 87 (699a ¶ 24). Also, Tandem permitted Mr. Perlberger to testify about its contents (700a ¶ 26; 754a-755a). Moreover, in the letter Mr. Lear set forth facts which were to be communicated to Beryl Vertue, a third party not associated with Tandem, and hence were not communicated to Mr. Perlberger in confidence. Furthermore, the last two paragraphs do not contain facts transmitted for the purpose of obtaining legal advice or services. To the extent Mr. Lear asked for advice as to how specific Tandem ought to be in disclosing details of the CBS deal, he sought business advice.

Accordingly, Exhibit 85 is not privileged because (1) Mr. Lear contemplated that the information contained in it would be conveyed to a third party, (2) it requested business rather than legal advice, and (3) Tandem's failure to object, first to its inspection and production and, second, to Mr. Perlberger's testimony with respect thereto, constituted a waiver.

Exhibits 56 and 133(900a-902a, 962a-965a)

These are identical documents. Exhibit 133 was produced without objection by Tandem under the same circumstances as Exhibits 79, 84 and 87 (700a ¶29). Exhibit 56 was produced by CBS in response to a subpoena *duces tecum* (700a ¶30), having apparently been obtained by CBS from

Mr. Cohn (701a ¶31; 757a, 965a), and Tandem failed to show that its possession by CBS is consistent with maintenance of its confidentiality. Moreover, pursuant to Viacom's Rule 34 Request for Production of Documents, Tandem produced yet another copy of the letter, which was a non-letterhead copy apparently from the files of Kaplan, Livingston, Goodwin, Berkowitz & Selvin (701a ¶33).

Accordingly, any privilege has been waived by (1) Tandem's failure to object to the inspection and production of Exhibit 133, (2) Mr. Cohn's voluntary production of the letter to CBS, and (3) Tandem's voluntary production of the letter to plaintiffs.

Exhibit 128(961a)

This letter was produced without objection by Tandem under the same circumstances as Exhibits 79, 84 and 87 (702a ¶35). It does not relate to facts furnished by Tandem to Mr. Perlberger for purposes of securing legal advice or services, but merely describes Mr. Perlberger's conversation with Mrs. Vertue, the talent agent for the owner of the British show on which ALL IN THE FAMILY is based.

Accordingly, Exhibit 128 is not privileged because (1) it relates solely to information learned by Mr. Perlberger from a third party, and (2) Tandem's failure to object to its inspection and production constituted a waiver.

Conclusion

The District Court's judgment should be in all respects affirmed.

Dated: New York, New York
September 16, 1974

Respectfully submitted,

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Of Counsel.

STATE OF NEW YORK)
: ss.:
COUNTY OF New York)

AFFIDAVIT OF SERVICE

MARIO A. ROSADO, being duly sworn, deposes and says that he resides at 1664 MACombs Rd, Bronx New York

; that on the 17 day of September, 1974, he served the within Brief For Plaintiffs-Appellees

on the attorneys for defendant-appellant

A.A.R. (via air mail 4) herein by mailing (copies) a true copy thereof, securely enclosed in a post-paid, properly addressed wrapper, in the mail box under the exclusive care and custody of the United States Postal Service at the corner of Wall Street and Broadway, New York, New York, addressed to said attorneys as follows:

HERMAN F. Selvin, Esq.
KAPLAN, Livingston, Goodwin
Berkowitz & Selvin
450 North Roxbury Drive
Beverly Hills, California 90210

The above address has appeared on the prior papers in this action as the office address of said attorneys.

Deponent is over the age of 18 years and not a party to this action.

Mario A Rosado

Sworn to before me this
17th day of September, 1974.

Maria A Rosado

Sworn to before me this
17th day of September, 1974.

Teresa Pernetti
Notary Public

TERESA PERNETTI
Notary Public, State of New York
No. 41-8329800
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1976

Two Copies

BY HAND

Atty's for Defendants